IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. RODNEY F. BRYSON, Appellant.	No. 38157-5-II (Consolidated with No. 38318-7-II) UNPUBLISHED OPINION

Armstrong, J. — A jury found Rodney Bryson guilty of possessing a stolen motor vehicle. In his brief, he argues that the prosecutor committed misconduct by expressing personal opinions on the truthfulness and credibility of two witnesses. In a pro se statement of additional grounds (SAG), Bryson disputes that he was in the stolen car and argues that he received ineffective assistance of counsel. And in a personal restraint petition (PRP) that we consolidated with his appeal, Bryson challenges his assault convictions from 1991 that were used in calculating his offender score.[1] Concluding that the prosecutor did not commit misconduct, that Bryson does not demonstrate ineffective assistance of counsel and that the evidence is sufficient, we affirm his judgment and sentence. And concluding that Bryson submitted a mixed PRP, we dismiss his petition.

FACTS

On January 25, 2008, Gabriel Palolo left his 1994 Nissan 240 SX convertible at home where he lived with his mother, Penny Palolo, and his wife. In the car, he had left a spare ignition

[1] A commissioner of this court initially considered Bryson's appeal and petition as a motion on the merits under RAP 18.14 and then transferred it to a panel of judges.

key and a copy of the vehicle registration. Around 1:00 p.m., Penny[2] came home from work and parked her car on the street about half a block from her house. As she walked through an alley to get to the house, she noticed Gabriel's car parked in the driveway. She also saw Bryson in the alley "kind of pacing back and forth behind [her] house." Report of Proceedings (RP) (July 8, 2008) at 15-16, 36-37. A few minutes after Penny entered her house, Bryson knocked on the door. When she answered, he asked whether a "David Gannon" was home. RP July 8, 2008 at 17-18. Penny responded "no," and shut the door and locked it. RP (July 8, 2008) at 18-19.

Penny watched Bryson from her kitchen window as he went down the alley. About 10 minutes later, she heard a car engine start and thought it sounded like her son's car. She heard the car driving down the alley and noticed the driver was grinding the transmission gears. By the time Penny rushed outside, the car was gone. She called Gabriel to see if he or a friend had the car and he said no. Gabriel then called the police and reported his car stolen. He also notified his friends that his car had been stolen and asked them to look for it.

Around 5:00 p.m. that night, Stephani Hendrickson, the girlfriend of one of Gabriel's friends, was at home and heard what sounded like Gabriel's car outside her house. She looked outside and saw someone drive by in Gabriel's car. Only one person was in the car. She later identified Bryson as the driver. Hendrickson started calling friends to let them know she found Gabriel's car and her mother called the police. She saw the car drive by two more times. After the third pass, the driver parked the car at a house down the street from Hendrickson's home.

[2] We refer to Penny and Gabriel by their first names to avoid confusion and we intend no disrespect.

Not long after the car stopped at the house, Gabriel's friends arrived and blocked in the car so it could not be driven it away. When Bryson came out of the house, Gabriel's friends confronted him about the car. Bryson claimed to have bought it from a man named "Juan," and explained that he had the title and key to the car. RP (July 8, 2008) at 53. A police officer showed up about five minutes later, confirmed the car was stolen, and placed Bryson under arrest. The officer took the key from Bryson and found the vehicle's registration papers in his pocket during a search incident to arrest.

The State charged Bryson with possession of a stolen motor vehicle. The State's witnesses testified as described above. Bryson denied stealing the car, getting into the car, or talking to Penny. The jury found Bryson guilty as charged.

ANALYSIS

A. Direct Appeal

First, Bryson argues that the prosecutor committed prosecutorial misconduct during closing arguments by vouching for Penny's honesty and asserting personal knowledge of whether Bryson was in the vehicle. A defendant claiming prosecutorial misconduct must establish the impropriety of the prosecution's comments and their prejudicial effect. *State v. McKenzie*, 157 Wn.2d 44, 52, 134 P.3d 221 (2006). Comments are prejudicial only where "there is a substantial likelihood the misconduct affected the jury's verdict." *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997). But a defendant who fails to object to an improper comment waives the error unless the comment is "so flagrant and ill-intentioned that it causes an enduring and resulting prejudice" that a curative instruction could not have neutralized the prejudice. *Brown*, 132 Wn.2d

at 561.

During closing arguments, the prosecutor stated the following:

> Now, [Penny] is not lying to you about what happened and I submit to you that she is not mistaken about what happened. This defendant came to the door and talked to her. She walked down the alley, she saw his pacing back and forth in the alley, she sees him in the area behind the car, she has a brief word with him and then he shows up at the door. Two days later she saw a photo array and said, that's the guy. All right. She had an opportunity to see him. It isn't cosmic coincidence that ten minutes after she spoke to him the car is started up and driven away.

RP (July 8, 2008) at 84. Bryson did not object.

It is misconduct for a prosecutor to state a personal belief as to the credibility of a witness. *State v. Warren*, 165 Wn.2d 17, 30, 195 P.3d 940 (2008); *State v. Brett*, 126 Wn.2d 136, 175, 892 P.2d 29 (1995). We will find the error prejudicial if it is "clear and unmistakable" that counsel is expressing a personal opinion. *Brett*, 126 Wn.2d at 49; *State v. Sargent*, 40 Wn. App. 340, 344, 698 P.2d 598 (1985). Use of the word "lie" does not, by itself, establish prosecutorial misconduct. *State v. Millante*, 80 Wn. App. 237, 251, 908 P.2d 374 (1995). In closing argument, the State has wide latitude in drawing reasonable inferences from the evidence, including commenting on the credibility of witnesses based on evidence in the record. *Millante*, 80 Wn. App. at 250.

In *Millante*, the defendant lied to the police when first questioned about his involvement in the victim's death. *Millante*, 80 Wn. App. at 251. During closing arguments, the prosecutor argued that his prior untruthful behavior indicated Millante was not a credible witness and could have lied on the stand. *Millante*, 80 Wn. App. at 251. Division One of this court found no

evidence of prosecutorial misconduct even though the prosecutor repeatedly used the word "lie" because, in context, the prosecutor was commenting on a witness's credibility based on evidence in the record. *Millante*, 80 Wn. App. at 251.

As in *Millante*, the prosecutor in this case was commenting on Penny's credibility, not expressing a personal belief about a witness's credibility. During cross-examination, the defense questioned Penny's memory and she admitted that she sometimes had memory problems, but stayed with her recollection of the day's events.[3] While the prosecutor used the word "lie," he went on to discuss why Penny was a credible witness based on the evidence in the record. Bryson does not demonstrate that the prosecutor engaged in misconduct. And even if the prosecutor's

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[3] Bryson's counsel engaged in the following exchange with Penny when he asked what the person in the alley was wearing:

Q Are you guessing or do you remember?
A I'm trying to remember.
Q Okay.
A I don't have a real good recall.
Q Okay.
A But I believe it was jeans, a T-shirt, some kind of a jacket, and tennis shoes.
Q When you say you don't have a good recall, do you mean on this particular instance --
A No.
Q -- or in general?
A In general.
Q Okay. Memory issues?
A Yeah.
Q Okay. Could you give me an example of that, where you have like a memory issue or where you don't remember too well?
A Oh, I - I don't know exactly what I could tell you.
Q Can you remember an incident?
A Not - not anything specific.

RP (July 8, 2008) at 30.

statement was improper, Bryson fails to demonstrate clear and unmistakable error, that the comment was flagrant and ill-intentioned, or that a curative instruction could not have neutralized any prejudice. Thus, he does not demonstrate reversible error.

Next, Bryson contends that the prosecutor's alleged assertion of personal knowledge about Bryson's presence in the car was misconduct. In his rebuttal argument, the prosecutor stated:

> How do I know that the defendant was in the car? Well, you know circumstantially that he was there ten minutes before the time the car was stolen. Well, you know direct that he was there ten minutes before the time the car was stolen. You know he was standing immediately outside the car the time the officer came up. We know that he got out of the car and you know he was in the car because he got the key and the registration apparently out of the glove box of the car.

RP (July 8, 2008) at 95. Bryson did not object to this statement either.

Taking the argument in context, the prosecutor was arguing the evidence, not expressing a personal opinion. Bryson denied being in the vehicle and Hendrickson stated that she saw him driving the vehicle. The prosecutor explained to the jury the evidence supporting Hendrickson's testimony - that she saw him in the car, saw him get out of the car, and saw him walk into a house. Bryson does not demonstrate that the prosecutor engaged in misconduct. And even if the prosecutor's statement was improper, Bryson fails to demonstrate clear and unmistakable error, that the comment was flagrant and ill-intentioned, or that a curative instruction could not have neutralized any prejudice. Thus, he does not demonstrate reversible error.

B. Statement of Additional Grounds (SAG)

In his SAG, Bryson argues that his counsel was ineffective (1) because he did not

subpoena any witnesses; (2) his original attorney did not turn over all documents to his new attorney, as ordered by the court; and (3) he was never in Gabriel's car.

We cannot address matters outside the trial record on direct appeal. *State v. McFarland*, 127 Wn.2d 322, 338 n.5, 899 P.2d 1251 (1995). Bryson did not include any affidavits, transcripts, or other record that his attorney failed to subpoena witnesses. Nor did he identify who the witnesses were or what they would have said. And he did not identify any evidence showing that the trial court ordered his prior attorney to transfer documents or evidence that such a transfer failed to take place. We cannot consider Bryson's arguments for ineffective assistance of counsel.

As to his third claim, that he was never in Gabriel's car, we defer to the fact finder on matters of witness credibility and evidence weight. *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004). Hendrickson testified that she saw Bryson in the vehicle. He denied being in the vehicle. The jury apparently believed Hendrickson and not Bryson. Bryson's argument that he was not in the vehicle is a matter of credibility that we cannot review.

C. Personal Restraint Petition (PRP)

In his PRP, Bryson asks us to expunge two 1991 third degree assault convictions from his criminal history and vacate the convictions without a new trial because the court concluded the trial without him present. Bryson also argues that he was subjected to double jeopardy when the trial court used his 1991 assault convictions to calculate his offender score for his 2008 sentence.

Because Bryson has submitted a mixed petition, we must dismiss it. If any one of a personal restraint petitioner's grounds does not fall within an exception to RCW 10.73.090, we

must dismiss the entire petition as a time-barred "mixed petition." *In re Pers. Restraint of Turay*, 150 Wn.2d 71, 86, 74 P.3d 1194 (2003); *In re Pers. Restraint of Hankerson*, 149 Wn.2d 695, 700, 702-03, 72 P.3d 703 (2003). A personal restraint petitioner must collaterally attack prior convictions within one year of his conviction becoming final unless the judgment and sentence is invalid on its face. RCW 10.73.090(1). Bryson's 1991 convictions became final on May 19, 1992, when we issued its mandate following his unsuccessful appeal. None of the exceptions of RCW 10.73.100 applies to his claim that the court concluded the trial without his presence. Bryson is therefore time-barred by RCW 10.73.090 from collaterally attacking his 1991 convictions on this ground. And because this ground is time-barred, Bryson has submitted a mixed petition that we must dismiss without reaching any other issues.

In conclusion, the prosecutor did not commit prosecutorial misconduct because he did not express a personal opinion on the truthfulness or credibility of any witness. Rather, he argued the credibility of those witnesses based on the evidence presented. Bryson's SAG arguments fail because they raise issues outside the record or issues of credibility. Finally, his PRP arguments fail because he submitted a mixed petition. We affirm Bryson's judgment and sentence and dismiss his petition.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports but it will be filed for public record pursuant to RCW 2.06.040.

Armstrong, J.

We concur:

Bridgewater, P.J.

Quinn-Brintnall, J.